

IN SENATE OF THE UNITED STATES.

JULY 25, 1842.

Ordered to be printed.—To accompany bill H. R. 90.

Mr. WRIGHT submitted the following

REPORT :

The Committee of Claims, to whom was recommitted the bill from the House entitled, "An act for the relief of James Tongue, John Scrivner, and the legal representatives of William Hodson, deceased," respectfully submit the following supplemental report :

The additional documents referred to the committee at the time of the recommitment of this bill, in addition to able arguments on behalf of the claimants, consist principally of certified copies of orders and correspondence between the Governor of Maryland and the militia officers of that State, bearing dates from March 17, 1813, to July 4, 1814, and now remaining on file in the office of the adjutant general of the State of Maryland, together with a requisition from the Secretary of War upon the Governor of Maryland, of the last-named date, for 600 artillery and 5,400 infantry, in all 6,000 men, the proportion to be furnished by that State of 93,500 to be called into the service of the United States if occasion should require, and to be held in readiness for that purpose.

The first of these extracts, as given in the documents, is in the words following, viz :

"GENERAL ORDERS FROM GOVERNOR WINDER.

"Extract from General Orders, dated March 17, 1813.

"The officers of the militia generally, but more particularly those of the volunteer infantry and cavalry, will attentively inspect the arms of their respective corps, and see that they are in the *best possible order* for service. The officers of the *militia in general*, near the waters of the *Chesapeake* and its *tributary rivers*, and on the seaboard, will be on the *alert to discover and repel* any depredations which may be attempted by the enemy.

"By order of

"JOHN GASSAWAY,
"Adjutant General."

This order the claimants consider as a permanent order, and as actively in force in 1814 as during the previous year, when it was issued, and they claim that the militia of the State of Maryland at Town Point and Tracy's Landing in October, 1814, when the attack was made by the enemy there, and their buildings were destroyed, were called into service by their officers under this order from the Governor of the State. These positions the com-

Thomas Allen, print.

mittee can not contradict, as there is no evidence before them that this general order of March, 1813, had been rescinded, and the testimony in the case shows that the officers commanding the militia at those points said they were in service under an order from the Governor of the State.

The requisition from the Secretary of War to the Governor of Maryland was not to call the militia of the State into the service of the United States, but to hold 6,000 men in readiness for such a call. It does not appear, from any of the evidence laid before the committee, that the call for these men to enter the service was ever, in fact, made by the United States, nor do they understand it to be pretended that the militia at Town Point and Tracy's Landing, in October, 1814, when these buildings were destroyed, were a part of these 6,000 militia of the State so directed to be held in readiness for the service of the United States, or that their being in service at those places, and at that time, was in consequence of this requisition from the Secretary of War, or had any connexion with it.

There is nothing in the additional testimony referred, to change the character or description of the military occupancy of these buildings at the time of their destruction, in the month of October, 1814, from the character and description given to it in the former report of the committee upon this bill, unless it be to remove the doubt, resulting from the original evidence, whether or not the militia who did occupy the buildings, so far as they were in military occupancy, were called into service by the regular authorities of their State. That point the committee believe should be considered settled by the supplemental testimony, and that it should be held to establish the fact that the militia were called into service in pursuance of regular orders from the proper State authorities.

An affidavit of David Bryerly is found with the additional testimony referred. This witness testifies that he was the second lieutenant "in a full volunteer company of mounted cavalry, armed with carbines and swords received from the United States arsenal at Harper's Ferry, which said volunteer company was raised in Virginia, and commanded by Captain Samuel Baker, and that the said company offered their services to the General Government during the late war, and their services were accepted by the President; and that a part of this company, under the command of Lieut. Murry and myself, did military duty at several places, during the late war, in Maryland, and that during the time our company were in the *actual pay and service* of the United States, we were once, for a short time (in September, 1814), doing duty at the fortification at Town Point, mouth of Tracy's creek, near Tracy's Landing." This testimony is supposed to be offered to show that the position at Town Point was recognised as a military position by the United States, and that troops in the service of the United States were sent there to occupy and defend it.

In the absence of any fact to show why it was that a part of a mounted company of cavalry was on duty at a single gun-battery at Town Point, and that for a short time only, while no exigency of the service is alleged as a cause for this application of a mounted force, and while the evidence of the witness upon which the fact rests shows that the company was acting within its character as mounted cavalry, by serving at many points within a short period, the committee can not feel themselves authorized to give to this occupation of the battery at Town Point, if indeed it was an occupation, any signification beyond the fact; and, therefore, whether their occupation would have been one within the laws of 1816 and 1817, so as to have charged the

destruction of the buildings to the United States, if that destruction had taken place while they were at the point, they can not by imputation make their occupancy in September devolve that liability upon the United States, because the buildings were destroyed late in the next month, in consequence of their then occupancy by the militia of the State of Maryland. The supplemental testimony has in no way changed the facts in relation to the occupancy of the tobacco warehouse as a naval depot by Commodore Barney ; and, therefore, the statements as to that occupancy in the original report of the committee remain unaffected.

The case, then, in the opinion of the committee, is brought back to the point upon which their original report was intended principally to place it, viz: Was the occupancy of the property by the militia of the State of Maryland, acting solely under State authority, and an occupancy for the objects pointed out in that report, such a one as brings the destruction of the buildings within the principles of the laws of 1816 and 1817, by which the committee considers itself bound in its action upon claims of this character?

The language of those laws the committee will repeat. The 9th section of the act of April 9, 1816, is in the following words:

"That any person who, in the time aforesaid, has sustained damage by the destruction of his or her house or building by the enemy, while the same was *occupied* as a *military deposite* under the *authority of an officer or agent of the United States*, shall be allowed and paid the amount of such damage: *Provided*, It shall appear that such *occupation* was the *cause of its destruction*."

That portion of the 1st section of the act of the 3d of March, 1817, which qualifies and more specifically defines the meaning to be given to the foregoing is in the following words:

"That the 9th section of the act entitled, 'An act authorizing the payment for property lost, captured or destroyed by the enemy, while in the military service of the United States, and for other purposes,' passed on the 9th of April, 1816, *shall be construed* to extend only to *houses or other buildings occupied* by an order of an officer or agent of the UNITED STATES as *a place of deposite for military or naval stores, or as barracks* for the military forces of the United States."

Is an *occupancy* of houses or *other buildings* by the militia of a State, under the sole orders of the authorities of the State, and for the single purpose of local defence, such an occupancy as brings the destruction of the house or building occupied within the provisions of these laws and makes the United States responsible for the payment of the damage arising from the destruction? This, in the opinion of the committee, is the real question presented for the decision of the Senate in the cases provided for in this bill; and inasmuch as that question is one of the highest importance in the construction of these laws, as applicable to claims which have been, and which may be presented, they prefer to present it to the Senate without the expression of an opinion on their part, and with the liberty to each member of the committee to take such part in the discussion and give such vote upon the decision of the point presented as his judgment shall direct, after being enlightened by the deliberations of the whole body and wholly unembarrassed by a previously-expressed opinion as a member of the committee, either upon the one side or the other. The bill is, therefore, returned to the Senate for its disposition under this statement of the facts and the law; and the committee respectfully express the hope that the course they have pursued will

not meet the disapprobation of the Senate. A proper respect to the views of the claimants and to the grounds upon which they press their claims requires from the committee one further remark. It is alleged by the claimants that many private bills have been heretofore passed by Congress to make compensation for buildings destroyed by the public enemy during this same war where the occupancy was exclusively that of the militia of a State, acting solely under State authority and for the local defence, and where the facts to bring the cases within the provisions of the laws before referred to were not as strong as in their cases. They have referred the committee to several cases to establish their position, and the supplemental evidence referred embraces several depositions giving a version of the facts in the cases referred to.

The committee have had recourse to the printed documents of Congress in all these cases, and especially to the reports of the committees upon which the several bills appear to have been passed, and in every case they have found the committee to state that, in its judgment, the testimony brought the case fully within the principles of the laws of 1816 and 1817, before referred to and quoted from, while in very few, if any, of the cases are there sufficient quotations from the testimony to enable this committee to form an opinion how far its conclusion upon the same facts would have been in accordance with, or disagreement from, the committees who made these reports. Their time has not permitted them to seek for the manuscript papers in many of the cases referred to as precedents, and in all those where they have inquired, the papers have been transmitted from the files of the two Houses of Congress to those of the Executive departments, to which the settlement and payment of the claim was referred by the law passed. The committee, then, are wholly unable to say whether this argument of precedent should avail the claimants under this bill or to what extent; and being of the opinion that an erroneous precedent should not be followed because it is a precedent, and that a claim resting upon sound principle does not need such authority to support it, they have not felt it to be their duty to follow the papers in the cases referred to any farther than they have expressed.

If a speculative opinion were demanded from them, they would be strongly inclined to conjecture that individual claims not stronger than those may have passed Congress; but as they do not *know* this fact, they prefer to put these claims upon the principles upon which such claims *should* pass, rather than upon a conjectural basis upon which other like claims *may* have passed; and they invoke the attention of the Senate to all the merits of these claims, believing, as they do, that the claimants are as worthy as any who have met the bounty of the Government and as richly deserve compensation in case their claims come within the principles of the laws under which their payment is claimed.

All which is respectfully submitted.